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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

RICARDO PAEZ, **Plaintiff and Appellant,** **v.** **SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021,** **Defendant and Respondent.**	**A120676** **(San Francisco County Super. Ct. No. CGC-07-461686)**

Ricardo Paez appeals from a judgment entered after his amended complaint against respondent was dismissed for lack of jurisdiction. The trial court concluded that the claims Paez asserted in his amended complaint were within the exclusive jurisdiction of the California Public Employment Relations Board pursuant to the Meyer-Milias-Brown Act (Gov. Code, § 3500 et seq.). Paez urges that the court had jurisdiction and improperly took judicial notice of certain materials submitted by respondent. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Paez was employed by the City and County of San Francisco (City) as a Custodial Supervisor I. ~(CT 7-8, 641)~ With respect to his employment relations under a

collective bargaining agreement, he was exclusively represented by the Service Employees International Union (SEIU).[1]

A. The City's Termination of Paez's Employment

In 2003, the City terminated Paez's employment for numerous workplace violations, including violation of the City's sexual harassment policy, violation of the City's part-time employment policy, misuse of employer resources, inappropriate and unprofessional actions, conduct unbecoming of a supervisor, mistreatment of persons, and attempting to interfere with an investigation.[2] The termination was apparently precipitated by a female coworker's allegations of sexual harassment and sexual assault.

B. Union Grievance Procedure and Arbitration

Pursuant to the collective bargaining agreement, the SEIU represented Paez in a grievance and arbitration process that culminated in a hearing in August and September 2004 before a third-party neutral arbitrator. At issue was whether Paez was discharged for just cause.

The arbitrator issued his opinion in February 2005. The arbitrator noted that Paez did not dispute several charges: failure to obtain permission from his employer to engage in outside employment, misuse of employer resources, and attempting to get a coworker

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[1] Respondent explains that this exclusive representation pertains to the contractual grievance procedure under a collective bargaining agreement between respondent and the City, and not to other matters such as Civil Service Commission proceedings. In his reply brief, Paez nonetheless disputes the SEIU's exclusive representation and complains that the SEIU should have been present when he was interviewed in Civil Service Commission proceedings. At issue in this appeal is not the merit of his claims but whether the trial court had jurisdiction to hear them.

[2] According to respondent, Paez was terminated from his employment in October 2003. According to Paez, he was terminated on May 30, 2003. Neither of them provide a citation to the record to support their assertions. The October 2003 date may reflect the civil service proceedings, while the arbitrator recited that Paez was discharged from employment "effective May 30, 2003." The date of the termination of Paez's employment is immaterial to the resolution of the appeal.

to remove x-rated videotapes from his office after Paez was placed on leave and ushered out of the building. The arbitrator also found, after a lengthy discussion of the evidence, that Paez had engaged in impermissible sexual harassment. The arbitrator concluded: "All in all, the evidence is simply too overwhelming and persuasive in establishing that the Grievant [Paez] engaged in unwanted sex with Mrs. H, at the very least, and on repeated occasions. Indeed, on two occasions at the workplace. It over-taxes credulity, as well as being seriously inconsistent with the thrust of our evidence, to think that Mrs. H fabricated the events she so painfully brought forward and testified about. Such misconduct clearly made the Grievant guilty of exaggerated and flagrant sexual harassment against an employee under his supervision, created a very offensive and hostile work environment, and grossly violated the Employer's published policies and rules. . . . The Grievant's discharge, despite his long years of service, was based, it must be concluded, on just cause."

C. Civil Service Commission Proceedings

After a hearing in October 2003, the San Francisco Civil Service Commission also upheld the City's termination of Paez's employment.

D. PERB Proceedings

In April 2005, Paez filed an unfair labor practice charge with the California Public Employment Relations Board (PERB). He alleged, essentially, that the Union breached its "duty of fair representation" under the Meyer-Milias-Brown Act (Gov. Code, § 3500 et seq.) (MMBA), based on its representation of him in the grievance procedure and arbitration and its failure to represent him at the Civil Service Commission hearing.

A regional attorney of the PERB issued a warning letter to Paez, advising him that his charge was legally insufficient and offering him an opportunity to amend. Paez filed an amended charge, which disputed the arbitrator's findings and again asserted that the union breached its duty of fair representation.

In June 2005, the PERB regional attorney ruled that Paez's amended charge was insufficient to state a prima facie case of a breach of the duty of fair representation. The

regional attorney explained: "Herein, you contend the union did not call certain witnesses on your behalf and did not present sufficient evidence to support your case. However, facts provided demonstrated the union provided you with an attorney, who presented witnesses and evidence on your behalf, and who vigorously cross-examined the City's witnesses. In fact the arbitrator's decision notes the amount of evidence the union presented on your behalf. Moreover, the union's failure to introduce every document you deem favorable or raise every argument you deem significant is not a breach of the duty of fair representation. [Citation.] . . . [¶] Additionally, you contend the union breached its duty of fair representation by refusing to represent you at the Civil Service hearing. . . . As the union is not required to represent you at Civil Service hearings, Local 790's failure to do so does not violate the MMBA." (Citations omitted.) Paez's charge was dismissed.

Paez appealed the decision of the PERB regional attorney to the PERB Board. In August 2005, the PERB Board upheld the dismissal, finding it "to be free of prejudicial error" and adopting it "as a decision of the Board itself."

E. Paez's Civil Lawsuit

In March 2007, Paez filed a 602-page civil complaint against SEIU Local 790 (predecessor to respondent Local 1021) for breach of contract and "malpractice-negligence." Seeking $400,000 and exemplary damages, Paez again asserted that the SEIU had not adequately represented him in regard to the termination of his employment and the grievance and arbitration procedure.

In his first cause of action, Paez alleged that SEIU Local 790 breached a collective bargaining agreement between the City and the SEIU by "failing to addequately [*sic*]and proffessionally [*sic*] represent [him] in allegations of sexual harassment" and performing in a "generally incopetent [*sic*] and unsatisfactory maner [*sic*]." As a result, Paez alleged, he lost his employment after 23 years of satisfactory service.

In his second cause of action for "Malpractice-Negligence," Paez alleged that the SEIU representative did not offer available evidence, concealed documents and other

materials, did not adequately investigate his claim, did not complete or conduct discovery, and delayed going to arbitration. Paez also alleged that the grievance procedure did not proceed in a timely manner.

In a narrative attached to his form complaint, Paez asserted that the SEIU breached a duty owed to him under the collective bargaining agreement by declining to represent him in the proceeding before the Civil Service Commission. Paez further contended that the attorney representing him at the arbitration was inadequately prepared. These deficiencies in representation, he alleged, violated the MMBA.

The union filed a demurrer to Paez's complaint. In his opposition to the demurrer, Paez acknowledged that he had filed a claim with the PERB on a charge of unfair representation, and the PERB dismissed the charge. The demurrer was taken off calendar after Paez filed an amended complaint.

Paez's amended complaint, filed in May 2007 against "SEIU Local 1021 Formerly Local 790," asserted the same causes of action and was based on the same alleged wrongdoing as his original complaint. This time, however, Paez alleged there was an "impl[ied] contract by Conduct" between Paez and SEIU Local 1021, arising from his payment of union dues to obtain proper union representation. Attached to the amended complaint was the opinion rendered in the arbitration.

In its answer to the amended complaint, the SEIU asserted that the superior court lacked subject matter jurisdiction because the authority to investigate and adjudicate the claims in the amended complaint resided exclusively with the PERB, pursuant to Government Code section 3509 of the MMBA. The SEIU further asserted that Paez's claims were preempted by the MMBA, barred by res judicata and collateral estoppel, and barred by Paez's failure to exhaust his administrative remedies.

The SEIU next filed a motion for judgment on the pleadings, on the ground the court lacked subject matter jurisdiction. The SEIU argued that, although Paez had labeled his claims as causes of action for breach of contract and malpractice-negligence, they were the same claims he asserted in the PERB proceedings for breach of the duty of fair representation under the MMBA, over which PERB had exclusive jurisdiction.

In support of its motion, SEIU requested judicial notice of the PERB rulings on Paez's unfair practice charge (including the dismissal letter from the PERB regional attorney and the PERB Board's decision affirming the dismissal), certain PERB regulations, and prior PERB decisions exercising jurisdiction over duty of representation cases.

Paez opposed the SEIU's motion for judgment on the pleadings, contending the superior court did not lack jurisdiction because it is a court of general jurisdiction. Paez also opposed the request for judicial notice.

The court granted the SEIU's motion for judgment on the pleadings and its request for judicial notice. The court concluded that it lacked jurisdiction over the amended complaint pursuant to Government Code section 3509, as the pleading was an effort by Paez to "restate the same claims" previously made before (and dismissed by) the PERB. If Paez wanted to seek review of the PERB decision, the court added, he would have to seek extraordinary writ relief pursuant to Government Code section 3509.5, subdivision (b). The court ordered entry of judgment in favor of the SEIU.

This appeal followed.

II. DISCUSSION

A trial court may grant judgment on the pleadings in favor of the defendant if, based on the face of the complaint and matters of which the court may or must take judicial notice, the court lacks jurisdiction over the subject of the causes of action. (Code Civ. Proc., § 438, subds. (c)(1)(B), (c)(3)(B), (d).) As mentioned, Paez contends the court erred in granting the SEIU's motion for judgment on the pleadings and its request for judicial notice. We consider each contention in turn.

A. Judgment on the Pleadings

In our review of the grant of a motion for judgment on the pleadings, we deem true all properly pleaded material facts and consider matters that may be judicially noticed. (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 989.) We affirm the

ruling if the complaint fails to state a cause of action—in this case, if the trial court lacks subject matter jurisdiction over Paez's claims. (See *ibid*.)

Collective bargaining and employer-employee relations for most California local public entities, including cities and counties, is governed by the MMBA. (*Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1077 (*Coachella*).) By statute, the PERB has exclusive authority to investigate and adjudicate unfair labor practices under the MMBA. Government Code section 3509, subdivision (b), reads: "A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the *exclusive jurisdiction of the board*. . . ." (Italics added.) As our Supreme Court has stated: "the Legislature vested the [PERB] with *exclusive jurisdiction* over alleged violations of the MMBA." (*Coachella, supra*, 35 Cal.4th at p. 1077; italics added.)[3]

Paez's amended complaint sought to assert claims against SEIU for its breach of its obligations under the collective bargaining agreement and its alleged failure to represent him adequately in connection with the termination of his employment and the grievance procedure and arbitration hearing. These are assertions of an unfair practice in violation of the MMBA and, indeed, are the same claims he asserted in the PERB proceedings. Because the PERB has exclusive jurisdiction over such claims, the trial court did not have jurisdiction to hear them, and Paez's complaint was properly dismissed.

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3 Management employees are exempt from PERB jurisdiction. (*Coachella Valley Mosquito and Vector Control District*, *supra*, 35 Cal.4th at p. 1077, fn. 1; Gov. Code, §§ 3509, subd. (d), (e), 3511.) Paez does not contend he was exempt.

As the trial court pointed out, to the extent Paez's amended complaint could be construed to seek *review* of the PERB decision, the trial court still lacked jurisdiction. Review of PERB decisions is limited by Government Code section 3509.5, subdivision (a), which provides in part: "Any charging party, respondent, or intervener aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the Board not to issue a complaint in such a case, . . . may petition for a writ of extraordinary relief from that decision or order." Under section 3509.5, subdivision (b), a petition for extraordinary relief would be filed not with the superior court, but "in the district court of appeal having jurisdiction over the county where the events giving rise to the decision or order occurred," and it must be filed within 30 days after the board's final decision.[4] The trial court did not err in granting the SEIU's motion for judgment on the pleadings.

Paez's arguments to the contrary are unpersuasive. For the most part, he debates the *merits* of his termination, the arbitration, the PERB's dismissal of his charge, and his civil complaint.[5] The issue in this appeal, however, is whether the trial court erred in concluding that it lacked *jurisdiction*.

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[4] The SEIU notes it is unlikely that Paez could have obtained judicial review of the PERB's decision not to issue a complaint, because subdivision (a) of Government Code section 3509.5 appears to exclude "a decision of the Board not to issue a complaint" from the review process. (See *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 556-557 [construing language of the Agricultural Labor Relations Act].) Paez does not raise the issue, and we need not address it to resolve the appeal. Whether Paez could have obtained review of the PERB ruling by petition to this court or not, it is clear that the *trial* court had no jurisdiction over Paez's amended complaint.

[5] For example, Paez contends he did nothing to warrant the termination of his employment, the City had no witnesses other than the complainant, consensual romantic relationships between a supervisor and a subordinate do not constitute sexual harassment per se, and the district attorney decided not to bring criminal charges against him. He complains that the arbitration process was unfair, the arbitrator decided the case wrongly, and the union attorney failed to represent him properly, primarily by not cross-examining the complainant. He contends the PERB decision was unfair and discriminatory, and he has not been able to obtain a copy of the arbitration transcript to prove his charge to the PERB. He also contends that "[s]ubstantial evidence submitted by Plaintiff and

His arguments pertaining to jurisdiction—which he left for his reply brief—are unavailing as well. For example, Paez contends the superior court is a court of general jurisdiction and it "consequently has original matter jurisdiction over all causes of action arising in California." He also denies that res judicata and collateral estoppel apply. However, neither of these arguments addresses whether the trial court lacked jurisdiction due to the exclusive jurisdiction vested in the PERB by Government Code section 3509.

Paez further argues that his amended complaint did not merely restate the claims he had made before the PERB, because his charge to the PERB was for "misrepresentation" while his civil complaint was for breach of contract, malpractice, and negligence. His argument is unpersuasive. In the first place, his charge before the PERB was *not* for "misrepresentation" (in the sense of fraud, which might be a distinct cause of action), but for "unfair representation" —that is, the SEIU's alleged breach of its duty of fair representation in connection with the accusations against him, the grievance and arbitration procedure, and the Civil Service Commission proceedings. In his civil complaint, his breach of contract and malpractice-negligence claims were, indeed, based on the same thing. Furthermore, even if his claims in the civil complaint were different from the charge he brought before the PERB, exclusive initial jurisdiction over those claims would be vested in the PERB, not the courts.

Lastly, Paez maintains that he seeks "another avenue to present his case in a court of law where he could be entitled to be heard, to present evidence and to cross examine witnesses," and to recover damages rather than merely having this court issue a writ vacating the PERB dismissal. His desire to have another forum to air his contentions, however, does not trump the Legislature's decision that those contentions must be heard in the first instance only by the PERB. Paez has had his opportunity before the PERB

Appellant [to the court] was sufficient to support plaintiff and Appellant complain [sic] and its causes of action." Citing pages 1-602 of the clerk's transcript, he insists there is overwhelming evidence that the SEIU breached its contract by not properly representing him. Paez also states, without explanation or authority, that the trial court punished him by granting respondent attorney fees.

and has not sought review of the PERB's ruling by timely writ petition. Paez fails to establish that the trial court erred in concluding it lacked jurisdiction over Paez's claims.

B. Judicial Notice

As mentioned, the trial court took judicial notice of (1) the PERB regional attorney's dismissal of his charge and the PERB Board's decision affirming the decision, (2) certain PERB regulations, and (3) prior PERB decisions in other cases, for the purpose of demonstrating its assertion of jurisdiction in similar matters. Paez contends this was error, because a court may take judicial notice of the existence of a document, but not of the truth of statements contained in the document, at least if the statements are subject to reasonable dispute. (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 113; see *Mangini v. R. J. Reynolds Tobacco Co*. (1994) 7 Cal.4th 1057, 1063, overruled on other grounds in In re Tobacco Cases II (2007) 41 Cal.4th 1257, 1276 (*Mangini*).)

The PERB decisions in Paez's case, the PERB regulations, and the prior PERB decisions were subject to judicial notice. (Evid. Code, § 452, subd. (b), (c), (h).) The statements contained within the PERB's decisions on Paez's charge—particularly the descriptions of Paez's allegations for purposes of determining the identity of his PERB charge and his amended civil complaint—were not subject to reasonable dispute. In fact, Paez in his own papers acknowledged the subject matter of his charge before the PERB and the dismissal of his charge. On this basis, the court did not err in taking judicial notice; alternatively, if there had been error, it was not prejudicial.

Paez argues that the trial court should not have taken judicial notice of the PERB's dismissal of his charge, because the court "is validating the wrong doing of the union [through] the grievance process in plaintiff representation in his dismissal from his job" and "validating the wrongdoing of the PERB and its decision, and the court is accepting the fact that it is fine to break the law if you are protected by a Government Agency." There is no indication the court drew such an inference from the dismissal or took judicial notice for that purpose. In any event, since the material was subject to judicial

notice and relevant to the jurisdictional issue, he fails to demonstrate error. (See *Mangini, supra*, 7 Cal.4th at p. 1063.)

Moreover, even if the trial court could not and had not taken judicial notice of the statements in his PERB case or other materials, it would still be clear from his amended complaint itself that Paez's claims were within the exclusive jurisdiction of the PERB, not the courts. He thus fails to establish reversible error.[6]

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

DONDERO, J.*

* Judge of the Superior Court of San Francisco City and County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[6] In his reply brief, Paez asserts: "The Respondent and Defendant SEIU, the City, the Arbitrator and the PERB preyed on the Appellant's lack of knowledge of the law, the lack of economic resources, the fact that he is Hispanic, that English is his second language and that he deposited his trust on them to be fair and correct." He cites no fact or record citation to support this accusation, and we have found none.